IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 5101

VIVIAN WARREN,
Petitioner,

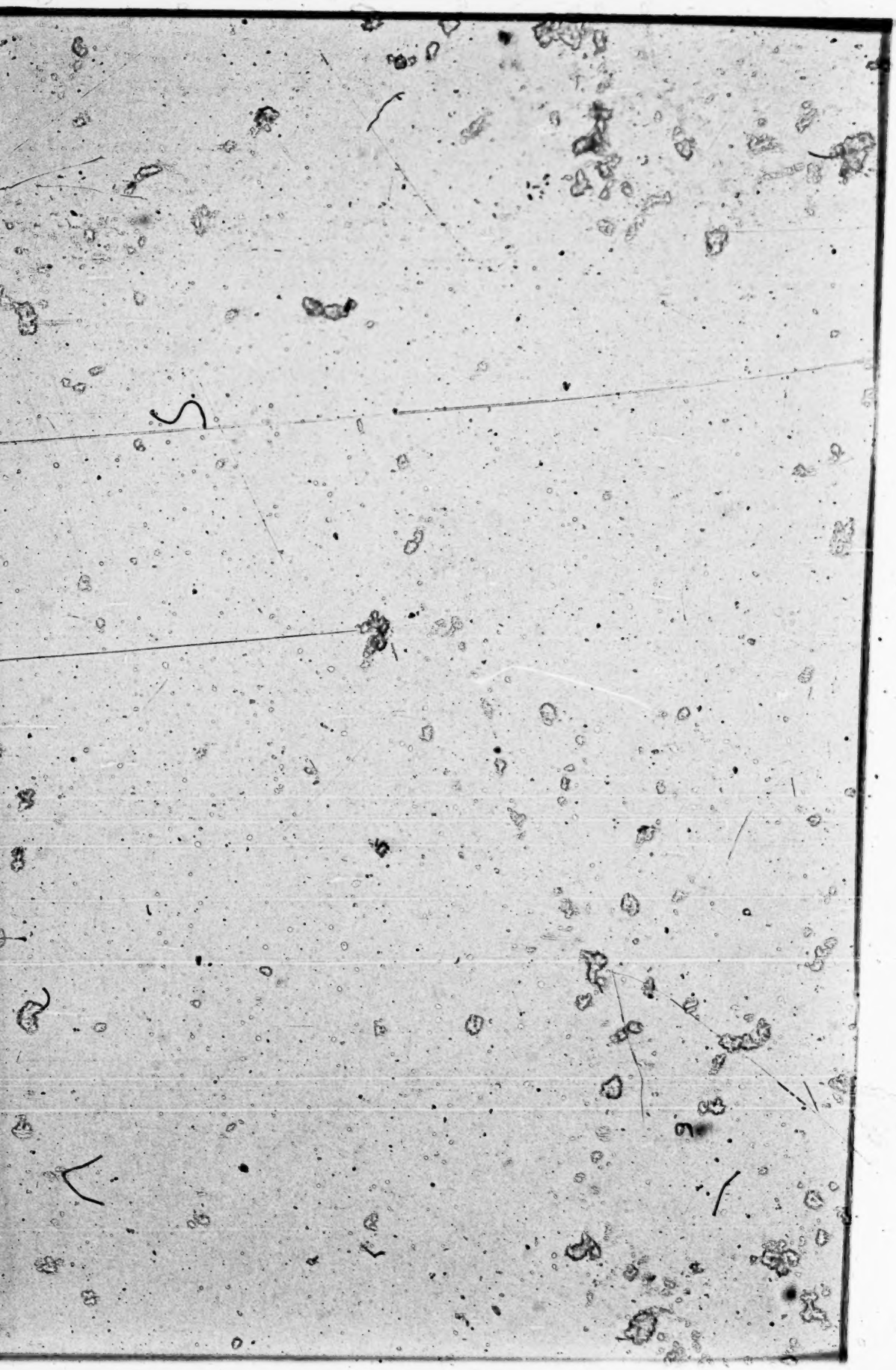
vs.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES F. CREWS
CREWS & MILLIARD
8600 Ward Parkway
Kansas City, Missouri 64114
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030



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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTION PRESENTED FOR REVIEW

The question here presented for review is whether or not the abstention doctrine applies where the validity of the state statute being attacked was upheld in 1941, but has not been attacked for thirty years, and has never been attacked on the grounds asserted by the petitioner.

STATEMENT OF THE CASE

Petitioner's statement of the case is correct with the exception of the omission of one ground on which the Circuit Court of Appeals based its decision. In its opinion the Court said, "One of these circumstances, however, arises when the issue of state law is uncertain, as we believe it to be in this case."[1]

ARGUMENT AND AUTHORITIES

Abstaining from taking jurisdiction in this matter because of the attack on a state statute which had never been before the Supreme Court of Missouri, the district court distinguished this case from *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), as being a case more likely to cause friction between the state and federal judiciary, since the title to thousands of real estate parcels in the State of Missouri could be affected. The Constantineau case had no such far-reaching effect.

The U.S. Court of Appeals for the Eighth Circuit agreed that a Federal Court decision on a Wisconsin law authorizing posting names of excessive drinkers in liquor establishments, and denying them the purchase of liquor, has a far less impact upon public interest than one upsetting titles to many tracts of real estate. Referring to *Homan* v. *Connett*, 152 S.W.2d 1053 (Mo.Sup. 1941), which was the last time the Missouri Supreme Court construed the foreclosure statute in question, the Court of Appeals found the application of the law to be uncertain because of the developments in the law since 1941, and because the question of "due process" was not raised in that case.

It is submitted that the District Court and the Court of Appeals ruled correctly in this matter. There is no

1. Petitioner's Brief, app. 103.

compelling reason for a federal decision in this matter. The act of foreclosure has been accomplished, and respondent has had possession of the property since before the case was argued in the Court of Appeals. No irreparable harm will result to petitioner by giving the Missouri Supreme Court an opportunity to pass on this question.

The doctrine announced by the Supreme Court in *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U.S. 341, 95 L.Ed. 1002 (1951), where the court at pages 349, 350 said:

> "Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '(f)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts."

should be followed in this case.

The instant case is very similar to *Reetz* v. *Bozanich*, 397 U.S. 82, 25 L.Ed.2d 68, 90 S.Ct. 788 (1970), and the result there should be followed in this case. As the Court said in that case at pages 86 and 87: "A state court decision here, however, could conceivably avoid any decision under the 14th Amendment and would avoid any possible irritant to the federal-state relationship."

The petitioner tries to read into the opinions of the District Court and the Court of Appeals, a decision on the merits concerning the validity of the statute in question.

The merits of this case have never been argued before any court. For this reason it would be particularly inappropriate to grant certiorari and hear the case as a companion with a case that has been heard on the merits by a three judge District Court as is suggested by petitioner.[2]

In *McCullough* v. *Kammerer Corporation,* 323 U.S. 327, 65 S.Ct. 297, 89 L.Ed. 273 (1945), the court dismissed the Writ of Certiorari which it had granted and said at page 328, "Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below."

Even if the instant case were one ripe for review on the merits, it is not similar in facts or issues to *Swarb* v. *Lennox,* 314 F.Supp. 1091 (1971), and should not be heard with that case as suggested by petitioner. In the *Swarb* case no notice is provided for before the default judgment was granted. In the instant case the Missouri statute is quite specific as to the minimum notice required, and the manner in which notice must be given.[3]

Respondent makes no attempt to make an exhaustive argument on the merits of the "due process" issue, since this issue is not before the court at this time. The only point made is that we are not here faced with an obvious case of denial of "due process" as confronted the court in *Wisconsin* v. *Constantineau,* supra, and the Missouri statutes in question should be examined first by the Missouri courts on this issue. As indicated by the District Court, this is a matter of far-reaching consequences to citizens of the State of Missouri, and one in which lending institutions and title companies in Missouri have a much larger

2. *Swarb* v. *Lennox,* 314 F.Supp. 1091 (1971), Petitioner's Brief, p. 24.

3. Mo.Rev.Stat. §443.320.

stake than the litigants involved in this case. Millions of dollars have been lent for purchase money mortgages based on the validity of this statute. Indeed, the petitioner would have no property rights to be protected absent the purchase money mortgage made in reliance on the foreclosure procedure provided for in the mortgage instrument and the statute.

CONCLUSION

Because the merits of this case have never been argued in a lower court, and the state statute involved is one which has never been attacked on constitutional grounds in the state courts of Missouri, and no irreparable harm will result to the petitioner by giving the Missouri courts an opportunity to rule on this very important Missouri question, the doctrine of abstention was properly applied by the lower courts, and the petition for certiorari should, therefore, be denied.

Respectfully submitted,

CHARLES F. CREWS
CREWS & MILLIARD
8600 Ward Parkway
Kansas City, Missouri 64114
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Respondent in Opposition was mailed, postage prepaid, properly addressed to Harvey L. McCormick, 1029 Oak Street, Kansas City, Missouri 64106, Attorney for Petitioner, this 9th day of August, 1971.

CHARLES F. CREWS